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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN DIVISION**

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| KENNETH KRYS, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>ROBERT AARON, *et al.*,<br><br>Defendants, | Case No.: 14-cv-02098 (JBS)(AMD)<br><br>Returnable: May 18, 2015 |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE TESTIMONY AND EXPERT REPORT OF DEFENDANTS' EXPERT AVRAM S. TUCKER**

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# I. INTRODUCTION.

Plaintiffs respectfully bring this motion to preclude testimony by Defendants' putative expert on damages, Avram S. Tucker, on the following grounds: (1) Mr. Tucker's opinions include improper factual findings and legal conclusions; (2) Mr. Tucker relies on alleged facts that are legally irrelevant; (3) Mr. Tucker fails to provide a basis for the determination of contingent liabilities; (4) Mr. Tucker's analysis of the value of PlusFunds imposes improper hindsight bias; (5) certain of Mr. Tucker's opinions are outside his area of purported expertise; and (6) certain of Mr. Tucker's opinions are speculative and unreliable. Mr. Tucker should be precluded from providing such testimony at trial, and his report should be stricken to the extent it contains such opinions.[1]

# II. DISCUSSION.

## A. Legal Standard.

Rule 702 of the Federal Rules of Evidence permits expert testimony if it "will help the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702(a). The testimony must therefore be "relevant" to a fact in issue. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

Expert testimony also "must be accompanied by a sufficient factual foundation before it can be submitted to the jury," *Elcock v. Kmart Corp.*, 233 F.3d 734, 754 (3d Cir. 2000) (citation and internal quotations omitted), to "insure [*sic*] that evidence presented by expert witnesses is relevant, reliable, and helpful to the jury's evaluation of such evidence." *Id.* at 744.

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[1] Mr. Tucker's report is attached as Exhibit 1 to the Declaration of David J. Molton submitted concurrently with this memorandum.

While an expert may "base an opinion on facts or data in the case that the expert has been made aware of," Fed. R. Evid. 703, he may not present testimony that purports to make findings as to disputed facts when he does not have personal knowledge. *See, e.g.*, *Lippe v. Bairnco Corp.*, 288 B.R. 678, 688 (S.D.N.Y. 2003) (precluding expert testimony that would, among other things, "summarize the relevant facts (as to which he had no personal knowledge) and then opine" on the intent of the parties), *aff'd*, 99 Fed. App'x 274 (2d Cir. 2004). "[A]t trial, … facts should … be proved by admissible evidence and not expert assertion …." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 677 (S.D.N.Y. 2007) (Sheindlin, J.).[2] Nor is the expert allowed to present testimony in the form of legal conclusions. "The only legal expert in a federal courtroom is the judge." *United States v. Caputo*, 517 F.3d 935, 942 (7th Cir. 2008); *see also, e.g.*, *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 1014 (D.N.J. 1991) ("[l]egal conclusions are not within the ambit of expert testimony permitted under Rule 703 of the Federal Rules of Evidence."); *Mars, Inc. v. Coin Acceptors, Inc.*, No. CIV A 90-49, 1996 WL 34385065, at *1 (D.N.J. June 27, 1996) ("[C]ourts jealously police the content of expert testimony to ensure that expert witnesses do not invade the province of the judge by instructing the factfinder about the applicable law."); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991). The expert's role is to *assist* the jury in its fact-finding endeavors, not to usurp the jury's role by presenting his own factual findings or legal conclusions.

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[2] Additional authority on this point is cited in Plaintiffs' Memorandum of Law in Support of Motion to Preclude Testimony by Defendants' Experts Raymond O'Neill and Anthony Travers at pages 2–4.

**B. Tucker's Opinions Include Improper Findings of Fact and Legal Conclusions.**

Mr. Tucker's expert report does not offer an opinion on the value of PlusFunds. Rather, its sole purpose is to contradict the valuation of Plaintiffs' expert, Dr. Joan Lipton.[3] In doing so, Mr. Tucker's report is replete with improper statements that PlusFunds was at fault for the unauthorized transfers of SMFF funds to unsegregated RCM accounts. For example:

- "Although Ms. Lipton purports to base her valuation on a hypothetical willing buyer/willing seller analysis, she fails to address the impact that knowledge of . . . (2) the risk of loss of *SMFF assets that PlusFunds placed in non-customer-segregated accounts RCM*, would have had on PlusFunds' value." Tucker Rep't at 8 (emphasis added).

- "Moreover, *it appears that PlusFunds agreed to the sweep arrangement, whereby SMFF's excess cash from Refco, LLC was regularly transferred to RCM*, as a condition of obtaining this seed capital investment through Refco." *Id.* at 15 (emphasis added).

- "[A] hypothetical willing buyer … would have had to consider what would happen to *PlusFunds* upon disclosure that it had *allowed hundreds of millions of dollars of funds belonging to investors … to be placed in non-customer segregated accounts ….*" *Id.* at 22 (emphasis added).

- "*PlusFunds' failure to comply* with these alleged promises, instead *transferring SMFF cash, on a regular basis, to non-customer-segregated accounts at RCM*." *Id.* at 26 (emphasis added).

- "PFGI [PlusFunds] and the PFGI Directors *violated their duties and obligations to segregate and keep segregated the assets* of the SPhinX SPCs when it approved the movement of funds from Refco LLC to RCM." *Id.* at 23 (emphasis added).

Such statements would be construed by the jury as factual findings combined with legal conclusions. Mr. Tucker is improperly attempting to impress upon the jury that PlusFunds' fault is a foregone conclusion. However, the crux of the dispute in the instant case centers directly

[3] 32 of 43 pages in Mr. Tucker's report are devoted solely to criticisms of Ms. Lipton's expert report. The remaining 9 pages largely comprise introductory remarks, the scope of Mr. Tucker's engagement, and his professional experience.

around the issue that Mr. Tucker so boldly states as a determined fact; namely, whether or not DPM and Aaron breached their contractual and fiduciary duties by moving SMFF funds to unsegregated accounts at RCM without proper authorization. Mr. Tucker's opinions are based solely on his own personal assessment of contested issues of fact. Yet Mr. Tucker does not purport to have personal knowledge of who, if anyone, authorized the transfers of money, because he was neither present during the transfers nor involved in the decision to make them. The concept of authorization also incorporates legal issues; thus, Mr. Tucker's assertions are also improper conclusions of law. In order to make an unbiased, well-informed decision, the jury should be free from Mr. Tucker's factual findings and legal conclusions purporting to resolve contested factual and legal issues in Defendants' favor.

### C. Tucker's Arguments Are Legally Irrelevant to Plaintiffs' Claims.

As quoted above, Mr. Tucker's basic argument is that the value of PlusFunds would be affected by a hypothetical buyer's knowledge that SMFF's excess cash had been held in unsegregated accounts, allegedly in violation of PlusFunds' duties to SMFF. Mr. Tucker's argument is legally irrelevant because it entirely sidesteps Plaintiffs' theory of damages.

Plantiffs claim that Defendants breached their fiduciary and contractual duties, causing moneys to be moved to unsegregated accounts and exposed to Refco's insolvency. *See* Am. Compl. ¶¶ 1, 19, 25, 129, 303–04, 337–38, 340–41, 354–56, 358. Plaintiffs further allege that if decision-makers at SPhinX and PlusFunds had understood that the moneys were so exposed, "they could have and would have caused SMFF's assets to be moved to customer segregated, protected accounts." *Id.* ¶ 143; *see also id.* ¶ 390. Thus, "[b]ut for Aaron's actions, SMFF's cash would not have been held at RCM and would not have been lost." *Id.* ¶ 254. Similarly, "[b]ut for DPM's actions, or inactions where action was required, SMFF cash would not have been held at RCM and would not have been lost. Both SMFF and PlusFunds would have avoided the losses they suffered and would have continued in business." *Id.* ¶ 280.

Hence, if PlusFunds proves liability at trial, its damages will be based on the difference between its actual value of zero and what PlusFunds' hypothetical value would have been *if Defendants had fulfilled their duties*—in other words, what the value would have been if the excess cash had not gone into unsegregated accounts (or had been timely removed from those accounts). In that "but-for" world, there would have been no loss when the Refco fraud was revealed because SMFF's excess cash would have been in segregated accounts where it was supposed to be. Thus, a hypothetical buyer would not have occasion to consider the effect the Refco scandal—or any alleged involvement of PlusFunds' directors and officers—on the value of PlusFunds.

Analogizing to a more tangible fact pattern, if Defendants were a construction firm being sued for negligently creating a hazardous condition in a building, the damages would be based on the difference between the actual value of the building and the hypothetical value of the building *without* the hazardous condition. It would be nonsensical to base damages on the difference between the actual value and the value of the building *with* the hazardous condition, because then there would be no difference in value.

Mr. Tucker is intermingling liability issues—authorization (or the lack thereof) to put money in unsegregated accounts, the alleged conspiracy between PlusFunds and Refco, and so on—with his damages analysis. But if the jury gets to the issue of damages, these liability issues will necessarily have been resolved in PlusFunds' favor. Defendants should not then be permitted to use the results of their wrongdoing—the consequences of SPhinX's cash having been in unsegregated accounts when Refco's insolvency was disclosed—to reduce the damages that are awarded after a finding of liability.

### D. **Tucker Does Not Provide Any Basis for His Opinion Regarding Contingent Liabilities.**

Mr. Tucker does not provide any basis for his opinion that PlusFunds would have had large contingent liabilities:

> One of the "known and knowable" facts that Ms. Lipton fails to consider is the litigation risk to PlusFunds associated with PlusFunds' relationship with Refco. A hypothetical *willing buyer* of PlusFunds, with reasonable knowledge of the relevant facts, *would know that (1) PlusFunds had allowed Refco to transfer SMFF cash to RCM*, where the cash was in non-customer-segregated accounts …. A hypothetical willing buyer would have realized that, unless mitigated, the *contingent liabilities associated with PlusFunds' exposure to litigation could exceed the value of PlusFunds' assets.*

Tucker Rep't at 22, 24 (emphasis added).

As explained above, this is legally irrelevant because the "but-for" value of PlusFunds is based on the SMFF cash *not* having been unsegregated accounts at RCM.

But even if relevant, Mr. Tucker's opinion is not adequately supported. Contingent liabilities are calculated by discounting potential liabilities by the probability of those potential liabilities becoming real liabilities. By definition, "a contingent liability is not certain—and often is highly unlikely—ever to become an actual liability. To value the contingent liability it is necessary to discount it by the probability that the contingency will occur and the liability become real." *In re Xonics Photochem., Inc.*, 841 F.2d 198, 200 (7th Cir. 1988); *see also Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295, 303 (2d Cir. 1997) (defining a contingent liability as "one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event.") (citation and internal quotations omitted). The contingent liability "must be reduced to its present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities." *Xonics*, 841 F.2d at 200. Accordingly, in order to establish a contingent liability, not only must the hypothetical buyer of PlusFunds know about the size of PlusFunds' potential liability but also the probability that the liability will accrue. Mr. Tucker does not provide any basis by which the jury can determine how much PlusFunds' potential liability would have been or the probability of that liability becoming a reality. Thus, there is no principled way for the jury to determine PlusFunds' purported contingent liabilities, and Mr. Tucker's statement that contingent liabilities "could exceed the value of PlusFunds' assets" is entirely unsupported.

### E. Tucker's Opinions Are Improperly Based on Hindsight Bias.

The following are just a few examples of the hindsight bias found in Mr. Tucker's opinions, rendering them unreliable:

- "Between October 2005 and March 2006 … net redemptions totaled nearly $1.4 billion." Tucker Rep't at 26.

- "[T]he financial crisis of 2007 and 2008 … would have likely had a significant impact on PlusFunds' AUM, revenues and income. During the years 2008 and 2009, hedge fund industry assets under management fell by 21%. During that same period, fund of hedge fund industry assets under management fell even more sharply—by 43%." *Id.* at 37.

- "In 2006, 'investable' hedge fund index funds struggled to meet the objective of mimicking the returns of a broad basket of hedge funds." *Id.*

- "In the latter part of 2008, turbulent markets and record investor redemptions forced hedge fund managers to sell investments into falling markets and left the industry down more than 23% …." *Id.*

- "A March 2012 Towers Watson report anticipated the future industry shape to comprise fewer and larger fund of hedge funds." *Id.*

As one court observed, a "retrospective appraisal can present special challenges" because "[i]ts accuracy may be tainted by the appraiser's knowledge of the market following the effective date …." *Backenstoes v. Cumberland Commons, LLC (In re Jeffrey J. Backenstoes)*, No. 1:10–

bk–04473, 2012 WL 4793501, at *9 (M.D. Penn. Oct. 8, 2012) (citation and internal quotations omitted). Such is the case here as Mr. Tucker has permitted hindsight bias to infect his opinions.

Instead, the value of assets "must be determined as of the time" the hypothetical sale takes place, not "at some time after bankruptcy intervened." *Statutory Comm. of Unsecured Creditors ex rel. Iridium Operating LLC v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 344-46 (Bankr. S.D.N.Y. 2007) (quoting *In re Coated Sales, Inc.*, 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992)). Accordingly, courts favor contemporaneous data and current market factors when determining the value of assets. *See*, *e.g.*, *Peltz v. Hatten,* 279 B.R. 710, 738 (D. Del. 2002) ("When sophisticated parties make reasoned judgments about the value of assets that are supported by *then prevailing marketplace values* and by the reasonable perceptions about growth, risks, and *the market at the time*, it is not the place of fraudulent transfer law to reevaluate or question those transactions with the benefit of hindsight.") (emphasis added), *aff'd*, 60 Fed. App'x 401 (3d Cir. 2003); *VFB LLC v. Campbell Soup Co.*, No. Civ. A. 02-137, 2005 WL 2234606, at *13 (D. Del. Sept. 13, 2005) ("[C]ontemporaneous evidence of fair market value has the advantage of being untainted by hindsight or post-hoc litigation interests"), *aff'd*, 482 F.3d 624 (3d Cir. 2007).

In this Circuit, a fair valuation "must be analyzed 'in a realistic framework'" within "'a reasonable time.'" *Travellers Int'l AG v. Trans World Airlines (In re Trans World Airlines, Inc.)*, 134 F.3d 188, 193-94 (3d Cir. 1998) (citation omitted). The fact that "new subscribers were added after the date of valuation is not relevant to the nature and value of the asset as of" the valuation date. *Newark Morning Ledger Co. v. United States*, 734 F. Supp. 176, 180 (D.N.J. 1990), *rev'd on other grounds*, 945 F.2d 555 (3d Cir. 1991), *rev'd*, 507 U.S. 546 (1993).[4] It

[4] The following hypothetical illustrates this principle:

follows that a decrease in investors based on future events is also not relevant. Each and every later-occurring event that Mr. Tucker cites as decreasing PlusFunds' value is irrelevant because a willing buyer could not possibly have had "reasonable knowledge" of those facts in September 2005.

Therefore, the Court should strike Mr. Tucker's expert opinions inasmuch as they refer to factual and legal conclusions or improper hindsight valuation.

**F. Tucker's Opinions Are Based on an Incorrect Legal Standard.**

In determining damages, Mr. Tucker distorts prevailing caselaw by asserting that "the applicable measure of damages is based on the difference between (1) the economic position Plaintiffs would have been in had Defendants acted as Plaintiffs allege they should have and (2) the actual economic position of Plaintiffs *at the time of trial* …." Tucker Rep't at 21 (emphasis added). This is simply another ploy to improperly and falsely depress the level of damages suffered by the Plaintiffs.

In certain cases, ex-post factors are necessary to properly calculate damages because, without consideration of those factors, the measurement of damages would not properly reflect

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> Suppose the plaintiff contracts to buy shares of stock in a small, closely held corporation for $1,000. The defendant seller reneges and the plaintiff is unable to buy the stock anywhere. On the date set for transfer, the stock was actually worth $1500 …. Suppose that one week later the corporation discovered that all of its property was a hazardous waste site and that cleanup costs would wipe out all the company's assets. The shares of stock were thereafter without value ….
>
> Nevertheless, the plaintiff will almost certainly be allowed to recover. The conventional "measurement" is the difference between the contract price and the market price *on the date of performance.* On that basis, the plaintiff is entitled to $500.

1 Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution § 3.1, at 285 (2d ed. 1993).

the true level of harm. Factors occurring after the original wrongdoing may be considered when the harm continues after that wrongdoing. For example, in *Sinclair Refining Co. v. Jenkins Petroleum Co.*, a patent case, the Supreme Court stated, "[t]his is not a case where the recovery can be measured by the current prices of a market. A patent is a thing unique. There can be no contemporaneous sales to express the market value …." 289 U.S. 689, 697 (1933). The same logic may apply to certain cases in which damages are measured by lost profits, as future profits cannot possibly be measured at the time of the wrongdoing. *See*, *e.g.*, *Envtl. Biotech, Inc. v. Sibbitt Enters., Inc.*, No. 2:03-cv-124, 2008 WL 5070251, at *5 (M.D. Fla. Nov. 24, 2008).

But when the harm *can* be measured as of a point in time, subsequent events are irrelevant:

> The general rule requires the courts to assess market value of a damaged, destroyed or converted chattel at the time of the harm. In the case of damage, this takes the familiar before-and-after form: the plaintiff recovers the value of the chattel as it stood immediately before the harm, less the value as it stood immediately afterward. In the case of destruction or conversion of the chattel, the time rule gives the plaintiff the value of the chattel *immediately before the destruction* or conversion, usually with interest.

1 Dan B. Dobbs, Law of Remedies: Damages–Equity–Restitution § 5.13(2), at 840 (2d ed. 1993) (emphasis added). "In effect, market or general damages close out the account between the parties on the date when performance was due under the contract (or the date of the harm in the case of a tort)." *Id.* § 3.3(3), at 301. Thus, "[i]f a business is completely destroyed," like PlusFunds was, "the proper measure of damages is the market value of the business *on the date*

*of the loss.*" *Id.* (emphasis added) (citing *KMS Restaurant Corp. v. Wendy's Int'l, Inc.*, 194 Fed. App'x 591, 601–02 (11th Cir. 2006)).[5]

In this case, PlusFunds plunged into bankruptcy shortly after Refco's insolvency was revealed in October 2005. The damages, the loss of business value due to the bankruptcy, were realized immediately. There was no continuing harm. Awarding Plaintiffs the market value that a willing buyer would have paid for PlusFunds in September 2005—immediately before the injury caused by Defendants' wrongdoing—is just compensation.

Depressing that value by considering events that occurred years later, such as the market crash of 2007 and 2008, is not only inconsistent with the law, but would not properly reflect actual harm incurred. Courts are skeptical of using this kind of hindsight valuation because, as here, it is often employed to manipulate results in anticipation of trial. *See In re Lehman Bros.*, 445 B.R. 143, 186-87 (Bankr. S.D.N.Y. 2011) ("These witnesses engaged in a result-oriented exercise of looking retrospectively and critically at the judgments made by Barclays … as part of a concerted effort of trying to find a windfall…. The Court finds that the hindsight valuation performed by the Movants' experts (i) does not take into consideration the judgments of those actively participating in the market in 2008 and the real world events and unique characteristics of that market …."), *aff'd in part, rev'd in part on other grounds sub nom. In re Lehman Bros. Inc.*, 478 B.R. 570 (S.D.N.Y. 2012), *aff'd sub nom. In re Lehman Bros. Holdings Inc.*, 761 F.3d 303 (2d Cir. 2014).

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[5] *See also, e.g.*, *Wilson v. Great Am. Indus., Inc.*, 746 F. Supp. 251, 256, 267 (N.D.N.Y 1990) ("This court has previously held that the appropriate measure of damages is the difference in the actual value of all that the plaintiffs should have received for their shares of Chenango and the actual value of what they received in exchange for their Chenango Stock …. However, *the court will not engage in an evaluation of the post-merger appreciation* in the value of GAI or Chenango, *nor will the court award damages based upon this post-merger accretion* ...." (emphasis added), *aff'd in part, rev'd in part on other grounds*, 979 F.2d 924 (2d Cir. 1992)).

Yet, that is exactly what Mr. Tucker has done. His opinions should be excluded to the extent they are based on events subsequent to PlusFunds' injury.

### G. Tucker States Opinions Outside His Expertise.

At various points in his report, Mr. Tucker provides opinions outside his expertise. He tacitly concedes this by citing to other experts' opinions. For example, Mr. Tucker relies on Professor Rene Stulz, who was not disclosed as an expert in this case, for the argument that Ms. Lipton failed to properly address important industry and operational factors. Tucker Rep't at 30–31.[6] The Court should not allow Mr. Tucker to express such opinions because Plaintiffs will not have the opportunity to cross-examine Professor Stulz. Such tactics would allow Defendants to backdoor opinions that cannot be controverted. This would be prejudicial and improper.

Additionally, Mr. Tucker states, "I have further assumed that SMFF could have filed a claim, not only against the bankruptcy estate of RCM, but also in the Refco, LLC bankruptcy." He later states, "Assuming SMFF had filed such a claim, the claim had been allowed, and the claim had been classified as a general unsecured claim, SMFF would have received a significant additional distribution." And finally, "In SMFF's case, this would have amounted to a distribution of $169 million, reducing SMFF'S alleged loss …." Tucker Rep't at 41.

Mr. Tucker does not cite any evidence, nor does he have the expertise to support this opinion. Mr. Tucker is not a bankruptcy expert in any sense of the word. His resume does not disclose any legal training, experience as a bankruptcy trustee, or any other qualification. Because Mr. Tucker has no expertise in bankruptcy law or procedure, these opinions should be excluded.

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[6] Professor Stulz was disclosed as an expert by certain defendants in *Krys v. Sugrue*, Nos. 08 Civ. 3065 (JSR), 08 Civ. 3086 (JSR) (S.D.N.Y.). Defendants in this matter never disclosed him as a potential expert, nor have they listed him as a witness in the Joint Final Pretrial Order.

### H. **Mr. Tucker's Proposed Testimony About SMFF's Possible Recovery in Bankruptcy Court is Speculative and Unreliable.**

Mr. Tucker notes that SMFF settled its preference litigation with the RCM bankruptcy estate in April 2006, retaining approximately $49 million. As noted, he then opines that SMFF "could have recovered substantially more than the $49 million that it recovered in settling the preference litigation, and potentially could have recovered 100% of the $312 million that had been on deposit at RCM in the days before Refco's bankruptcy." Tucker Rep't at 41-42, Molton Decl., Ex. 1.

In reaching this conclusion, Mr. Tucker (not a bankruptcy expert) assumes that if SMFF had repaid the $312 million preference to Refco, then SMFF could have filed claims against the RCM and Refco, LLC bankruptcy estates and that those claims would have been deemed allowed claims. *Id.* at 39; *see also id.* at 40 ("I understand [the expert report of Paul Pocalyko] to mean that had SMFF repaid the entire $312 million, then this full amount would have gone into the pool available to pay Class 3 Claims, rather than the pool to pay claims of RCM securities customers.") Mr. Tucker offers no independent opinion as to whether such claims would have been allowed in bankruptcy court, or which "pool" the $312 million would have gone into. His conclusions are based on unreliable and unsupported assumptions and should be disallowed. Put another way, without any basis to conclude that SMFF could have filed successful claims against the bankruptcy estates, his opinions about how much would have been recovered are purely speculative.

Likewise, in concluding that SMFF "potentially could have recovered" $312 million in bankruptcy, Mr. Tucker, "understands" that another Refco creditor, the Rogers Funds, obtained a recovery in bankruptcy that exceeded the amount it had on deposit at RCM at the time of RCM's bankruptcy. *Id.* at 42-43. Significantly, Mr. Tucker does not analyze the claims of the Rogers

Funds in any detail. Indeed, when asked about the similarities between SMFF and the Rogers Funds, he acknowledged that "I wasn't asked to study that fully[.]" Tucker Dep. Tr. at 207, Molton Decl., Ex. 2. Indeed, Mr. Tucker clarified that his analysis was based on an assumption that a court would have concluded that there was such a similarity: "I think that to the extent that the court determines that the Rogers [Funds] were in a similar situation to SMFF and to the extent that the defendants argue that this is what could have happened but for the conduct of a third-party unrelated to the defendants, then it might be used to demonstrate that the losses were not caused by the defendants but caused by other parties." *Id.* at 206. This approach is equally unreliable, as Mr. Tucker was "not asked to study" the similarities between SMFF and the Rogers Fund. *See* R&R on the Defendants' Motion for Summary Judgment, MDL 1843, dated Apr. 21, 2013 at 34, Molton Decl., Ex. 3 ("As the Plaintiffs point out, there are a number of differences between the Rogers Funds claims and those of SMFF," including that the cases were "in a different procedural posture.").) Mr. Tucker's unsupported analysis—which was made "to the extent" a court might reach certain conclusions and "to the extent" counsel made certain arguments—is too speculative to be offered as expert testimony.

Finally, Mr. Tucker did not do any independent analysis in reaching his conclusions. Instead, his determination of the value of any distribution to SMFF was "based on assumptions made by Paul Pocalyko in the expert report he submitted on behalf of Plaintiffs in their lawsuit against the Schulte Roth law firm." Tucker Report at 39, Molton Decl., Ex. 1. In other words, Mr. Tucker again purports to rely on the assumptions of another expert witness, without taking any position on whether they are correct, and uses those assumptions to determine that SMFF would have achieved a certain recovery in the bankruptcy court. Again, Mr. Tucker's approach is clearly insufficient. Because Mr. Tucker has no expertise in evaluating bankruptcy claims—

and made no effort to do so here—and because he relies solely on the analysis of another expert in determining the amount of any allowed claim, Defendants have not shown that his testimony would be sufficiently reliable to be admitted at trial. Indeed, there is no connection between Mr. Tucker's claimed expertise and these opinions: he simply purports to use another expert's analysis in a different context. Thus, his testimony as to this point is neither based on "professional studies or personal experience." *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Mr. Tucker's testimony about what SMFF would have recovered in bankruptcy is speculative and unreliable, and not based on any "expert" opinion, and accordingly should be disallowed.

## III. CONCLUSION.

For the foregoing reasons, Mr. Tucker's expert report and proposed testimony should be excluded.

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Respectfully submitted,

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